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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

BRENDA PATTERSON,

*Petitioner,*

vs.

McLEAN CREDIT UNION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**REPLY MEMORANDUM FOR THE PETITIONER**

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On Petition For A Writ Of Certiorari To  
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REPLY MEMORANDUM FOR THE PETITIONER

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I.

THE RACIAL HARASSMENT CLAIM

Respondent fails to articulate any  
legal theory or principle that would  
justify the exclusion of a cause of

action for racial harassment from Section 1981's comprehensive coverage. Instead, in an attempt to distinguish away the conflict between the Fourth Circuit's decision below and the several federal courts of appeals that have upheld a Section 1981 cause of action for racial harassment, respondent seizes on two irrelevant factual differences alleged to exist between the cases. First, respondent attempts to distinguish one of the cases relied upon by plaintiff on the ground that the Section 1981 claim for racial harassment was joined with a parallel claim of racial harassment under Title VII. See, e.g., Brief for Respondent, at 7 (discussing Hamilton v. Rogers, 791 F.2d 439 (5th Cir. 1986)). See also Brief for Respondent, at 11. Second, respondent distinguishes several other decisions that conflict with the

ruling below on the ground that the racial harassment claim in those cases allegedly was joined with another claim of discrimination, for discharge or failure to promote.

Respondent fails to explain why the factual distinctions to which it points have any relevance to the legal holdings of the cases cited by plaintiff. It is the holdings of several courts of appeals that Section 1981 encompasses racial harassment that conflict with the Fourth Circuit's ruling below. The fact that the Section 1981 claim for racial harassment was joined with some other type of claim is no more relevant to the circuits' holdings concerning Section 1981's coverage than is the fact that the instant case involved a bank clerk, while the cases upholding section 1981's coverage of racial harassment involved a

firefighter, Hamilton v. Rogers; a sample librarian, Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984); an Insulmat operator, Ransay v. American Air Filter Co., 772 F.2d 1303, 1306 (7th Cir. 1985); and a sales associate, Block v. R. H. Macy & Co., 712 F.2d 1241, 1243 (8th Cir. 1983). As discussed in more detail below, none of the decisions that has upheld a Section 1981 claim for racial harassment indicates that the holding was contingent upon joinder with another type of claim. Moreover, any theory that tempted to justify such a distinction would squarely conflict with this Court's prior decisions.

Respondent attempts to distinguish the ruling in Hamilton v. Rogers, 791 F.2d at 442, that section 1981 encompasses an "offensive work environment" caused by racial harassment,

on the ground the Section 1981 claim was joined with a parallel claim under Title VII. See Brief for Respondent, at 7. Respondent elsewhere argues that permitting an independent Section 1981 claim for racial harassment would "effectively by-pass the purposes of Title VII." Brief for Respondent, at 11.

The decision in Hamilton v. Rogers makes clear that the court gave independent effect to the Section 1981 claim, in addition to the Title VII remedies for racial harassment. Compensatory damages for emotional injury are not available under Title VII. Nonetheless, the court held that an award for such injury was available under sections 1981 and 1983 for plaintiff's "embarrassment, humiliation, and mental distress from his work environment." 791

F.2d at 442-43, 444 (emphasis added).<sup>1</sup>

Respondent's strained attempt to distinguish Hamilton v. Rogers would mean that even though Section 1981 provides a separate and additional remedy for racial harassment, this remedy would not be available unless the Section 1981 claim was joined with a parallel Title VII claim. However, this interpretation of Hamilton v. Rogers squarely conflicts with the Court's ruling in Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975), that all remedies provided by Section 1981 are separate and independent from Title VII remedies that may exist for similar conduct.

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<sup>1</sup> Respondent incorrectly states that the Court in Hamilton held the employer liable only under Title VII. Brief for Respondent, at 6. In fact, the plaintiff's supervisors, who were determined to be an employer, were held liable for compensatory damages under Sections 1981 and 1983. See 791 F.2d at 442-43, 444.

In Johnson, the Court rejected the argument that Title VII pre-empts a parallel Section 1981 claim. In that case, the Court held that the timely filing of a charge with the EEOC under Title VII did not toll the running of the limitations period for a Section 1981 claim based upon the same facts. *Id.* at 466. The Court concluded that "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Id.* at 466 (emphasis added). See also Brown v. GSA, 425 U.S. 820, 829, 833 (1976).<sup>2</sup>

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<sup>2</sup> These decisions are soundly based on the legislative history of Title VII. In 1964, Congress rejected an amendment proposed by Senator Tower that would have made Title VII the exclusive federal remedy for employment discrimination. 110 Cong. Rec. 13650-52 (1964). When Title VII was extended to cover state and local employees in 1972,

Respondent attempts to distinguish Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984), Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985), and Block v. R. H. Macy Co., 712 F.2d 1241 (8th Cir. 1983), on the ground that in each of these cases the claim of racial harassment was joined with a claim

both the House and the Senate Reports reaffirmed the continued viability of Section 1981 as an independent remedy for all types of employment discrimination. The House Report stated:

[T]he Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1970 ..., 42 U.S.C. § 1981, ... is in no way affected. ... Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 18-19 (1971). The Senate Report similarly provided that Title VII was not "meant to affect existing rights granted under other laws." S. Rep. No. 415, 92d Cong., 1st Sess. 24 (1971).

of discriminatory firing, layoff or failure to promote. Respondent's theory is similar to the Fourth Circuit's ruling below that Section 1981 covers only "hiring, firing and promotion," because these matters "go to the very existence and nature of the employment contract." While the Fourth Circuit ruled that Section 1981 never covers other terms and conditions of employment, respondent suggests that claims of racial harassment are covered only if they are joined with a hiring, firing or promotion claim.

Respondent's novel joinder theory does not eliminate the conflict between the Fourth Circuit's ruling and the decisions of other courts of appeals. First, even accepting arguendo the joinder theory, a conflict still exists between the Fourth Circuit's absolute exclusion of racial harassment claims and

the partial coverage of such claims under respondent's interpretation of the other decisions.

Second, the decisions that have upheld Section 1981's coverage of racial harassment make clear that these holdings are not contingent on joinder with another type of claim. Contrary to respondent's assertion, see Brief for Respondent, at 8, Carter v. Duncan-Huggins did not involve the issues of hiring, firing and promotion. See 727 F.2d 1228-30.<sup>3</sup> Although respondent claims that "the issues presented to the jury are not set forth in the Opinion" in Carter, the opinion makes very clear what

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<sup>3</sup> Carter v. Duncan-Huggins also did not involve a parallel Title VII claim. The employer was too small to be covered by Title VII, so the plaintiffs' only cause of action was under 42 U.S.C. § 1981. 727 F.2d at 1228. Thus, neither of respondent's alleged factual distinctions exists with respect to the Carter decision.

those issues were. The court upheld the jury's verdict on the ground that the evidence supported the conclusion that plaintiff "consistently suffered conduct and conditions that were worse than those imposed upon her fellow white employees." 727 F.2d at 1233. The award for "humiliation and other emotional harm" was based on a "'disrespectful' racial anecdote" and the taunting of plaintiff by a fellow employee. Id. at 1238.

Although the claim of racial harassment in Ranney v. American Air Filter Co., was joined with other claims of discrimination, including improper layoff procedures, it is clear that both the district court and the court of appeals viewed the racial harassment as a separate and independent cause of action. The instruction to the jury set forth three separate claims: "the claims of

racial harassment and/or denial of equal opportunities for change in his job classification and/or improper layoff procedures." 772 F.2d at 1312 (emphasis added). The jury was told that plaintiff "has the burden of proving separately as to each claim" the elements of a prima facie case. *Id.* Under respondent's alleged distinction, the jury would have been instructed that it could not find for plaintiff on the harassment claim unless it first found for plaintiff on the layoff claim. *See* Brief for Respondent, at 8. No such instruction was given. Instead, the jury was told that it could find for plaintiff on the harassment claim "and/or" the layoff claim. 772 F.2d at 1312. The court of appeals in *Ramsey* specifically upheld the jury instruction. *Id.* at 1312-13.

Similarly, in Block v. R. H. Macy &

Co., 712 F.2d 1241 (8th Cir. 1983), the award of punitive damages under Section 1981 was upheld as supported in part by evidence of a supervisor's use of a racial epithet. The use of a racial epithet occurred as a separate incident, prior to plaintiff's discharge. 712 F.2d at 1247. There is no hint in the *Block* opinion that Section 1981's coverage of this incident of racial harassment was contingent on joinder with a claim concerning plaintiff's subsequent discharge.

Respondent also attempts to distinguish Wilmington v. J. I. Case Co., 793 F.2d 909 (8th Cir. 1986), on the ground that "the opinion of the Court does not specifically indicate that a separate issue of racial harassment was submitted to the jury under Section 1981." In fact, the opinion in

Wilmington does indicate that this issue was separately submitted to the jury. The court of appeals noted that the jury returned a "special verdict" that "Wilmington was the victim of intentional discrimination in the terms and conditions of his employment." 793 F.2d at 916. The Eighth Circuit treated this claim as separate and independent from plaintiff's discharge claim. Id. at 915-16.

Respondent provides no legal theory or analysis to support the novel joinder rule that it suggests limits the holdings of four courts of appeals. Apparently, respondent's legal argument is that Section 1981 provides a remedy for conduct that does not constitute a violation of Section 1981, but only if the request for the Section 1981 remedy is joined to a separate violation of

Section 1981. Respondent states that if the jury had found in favor of petitioner on her layoff and promotion claims, "then the jury could have properly awarded (if the facts supported) damages for racial harassment." Brief for Respondent, at 8. Under respondent's theory, if an employer subjects an employee to racial harassment and also fires her for a discriminatory reason, the employee can recover for both the harassment and the discharge. If, however, the employer simply harasses the employee so that the terms and conditions of her employment are substantially more oppressive than those of her white co-workers, she can recover nothing under Section 1981. Petitioner is aware of no precedent in any area of law for the proposition that liability for one violation of a statute is dependent on proof of a second violation. Petitioner

submits that such a bizarre and novel limitation on their rulings cannot reasonably be attributed to these four courts of appeals.

## II.

### THE JURY INSTRUCTIONS

Respondent misapprehends petitioner's claim with regard to the jury instructions. Since a jury issues no findings of fact, it is impossible to know what facts it did or did not believe to be true in the absence of correct instructions. Thus, respondent's discussion of what it believes the facts to be is simply beside the point.

It is clear that evidence was presented to the jury from which it could have found, if properly instructed, that petitioner was not considered for a promotion free of racial discrimination. Thus, the district court, contrary to

respondent's position, noted that petitioner "offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race." And the evidence of racial harassment, racial epithets, and different treatment all supported the claim that the real reason for the failure to promote was race.

Thus, the instructions that required the jury to find proof of superior qualifications in order to hold for petitioner nullified this evidence. It is the fact of this instruction, and not what the jury might have found if properly instructed, that is at issue here.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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